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In The

Supreme Court of the United States

October Term, 1991

JAMES M. DARTEZ, RICHARD C. SMITH, SR., WILLIAM B. HARDY, CECIL OVERSTREET and JOHN D. BURKE,

Petitioners,

v.

OWENS-ILLINOIS, INC. and FIBREBOARD CORPORATION,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REASONS FOR THE REPLY 1

REPLY TO RESPONDENTS' ARGUMENT 2

A. The Lack of Conflict Question 2

B. Respondents' "Reasons" Demonstrate The Basic Misconception Of The Evidence And The Rule Necessitating This Court's Intervention . 3

C. Respondents' "Independent Grounds" Do Not Withstand Analysis 6

D. The Implications Of This Case Warrant This Court's Review 8

E. The Court Of Appeals Exceeded Its Power And In The Process Denied Petitioners Due Process 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASE

Continental Ins. Co. of New York v. Sherman, 439 F.2d 1294 (5th Cir. 1971) 2

STATUTES

S.Ct. Rule 10.1(a) 2, 3

Fed. R. Civ. P. 8 5

Fed. R. Civ. P. 8(e)(2) 5

Fed. R. Civ. P. 11 5

Fed. R. Evid. 102 8

Fed. R. Evid. 403 7

Fed. R. Evid. 411 7

Fed. R. Evid. 801 ..... 2, 3, 4, 8, 9

Fed. R. Evid. 801(d)(2) 2

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PETITIONERS' REPLY BRIEF

REASONS FOR THE REPLY

There is a recurring theme in Respondents' brief that suggests that exceptions to the Federal Rules of Evidence should be made for litigation involving insurance. Indeed, Respondents' conclusion states, "No rule of evidence should allow an insured's efforts to secure insurance to be transformed into a basis to hold the insured liable . . . " (Brief 28). The reasons assigned for this unusual idea require this Reply.

The truth of the evidence in question has not been disputed by Fibreboard. On the contrary, it concedes three important points: 1. that it offered evidence about

asbestos and its effects on the human body (Brief p. 8); 2. the evidence was offered "in order to assist the [California] court in construing the meaning of Fibreboard's insurance policies." (Brief p. 2); and, 3. the evidence and the law entitled Fibreboard to judgment in its favor. (Brief p. 8, footnote 8). There was no suggestion that the evidence was hypothetical or in the alternative.

The evidence on the effects of asbestos on the human body was germane to the issues tried below, product exposure, producing cause, and compensatory damages.

Fibreboard's troubles with insurance companies and "immense financial burdens" is a sympathetic appeal but provides no basis for disregarding the plain meaning of Fed. R. Evid. 801(d)(2).

REPLY TO RESPONDENTS' ARGUMENT

A. The Lack Of Conflict Question

Pre-Rules decisional law is relevant only if there is an ambiguity in Fed. R. Evid. 801. If there is no ambiguity, the plain meaning of the rule controls.

However, pre-Rules decisional law supports Petitioners' position. Respondents cite dictum from *Continental Ins. Co. of New York v. Sherman*, 439 F.2d 1294, 1298 (5th Cir. 1971), but the holding, at page 1300, is quite different: "In light of the fact that Continental is now again in the case as a party defendant in Coates & Dorsey's action for indemnification, its original complaint . . . is admissible as an admission . . . " The *Hardy* and *Dartez* decisions conflict with Rule 801 and the Fifth Circuit's prior decision. The decisions are not supported by either statutory or common law. The Fifth Circuit "departed from the accepted and usual course of judicial proceedings" invoking the provisions of S.Ct. Rule 10.1(a).

B. Respondents' "Reasons" Demonstrate The Basic Misconception Of The Evidence And The Rule Necessitating This Court's Intervention

Respondents assign reasons to explain their contention that the Fifth Circuit did not depart "from the accepted and usual course of judicial proceedings" provision of S.Ct. Rule 10.1(a). Analysis of the "reasons" exposes their flaws.

FIRST: Respondents claim that the exhibits recited testimony of medical witnesses in California. Not true! The exhibits recited facts urged by Fibreboard in its argument for judgment. Fibreboard adopted selected facts and used them to persuade the California court to render judgment for it. They were classic adoptive admissions.

SECOND: The words of Fed. R. Evid. 801 are common words easily understood. They require no construction in and of themselves, and Congress has provided any needed definitions. The problem arises when the Fifth Circuit grafted exceptions onto Rule 801 when it had no authority to do so.

THIRD: Respondents' argument that the admissions in question were not "assertions" is refuted by the plain meaning of Fed. R. Evid. 801 and the circumstances under which the admissions were made. They were made in a court of law, by duly authorized attorneys "in order to assist the court in construing the meaning of Fibreboard's insurance policies." (Brief 2). Fibreboard is less than candid if it now suggests that it did not **intend** to make the statements that were part of the factual basis supporting the judgment it received.

FOURTH: The evidence in question came from Fibreboard's proposed medical findings of fact[1] and post-trial brief on the medical evidence[2] submitted to the court

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[1] Respondents' record excerpts, Tab 5A.

[2] Respondents' record excerpts, Tab 5B.

in California. Although supported by their expert witnesses, the statements were those of Fibreboard and the other policyholders. For example, on page 8 of the post-trial brief, Fibreboard stated "The *only* conclusion that can be drawn from the medical evidence is the conclusion that is virtually uniform in the medical literature – asbestos-related injuries are the result of a continuous process, beginning with first exposure and continuing through clinical manifestation." Having obtained judgment for a multi-billion dollar benefit, Fibreboard is now estopped to claim it did not intend to be bound by the statements.

Respondents declare that Petitioners are guilty of misstatement in representing to this Court, "The briefs were offered to persuade the court to render a multi-billion-dollar judgment for movants . . . (Pet. 12-13)." (Brief 20). Petitioners' assertion was confirmed April 2, 1992, when Fibreboard's attorneys FAXed a news release to Petitioners' counsel. The news release reported that Fibreboard had settled with one insurance company for approximately $360 million dollars, (Reply App. 3) and that if its appeals were successful "Fibreboard believes it will ultimately receive insurance resources of $1.584 billion . . . " (Reply App. 5) Fibreboard was only one of several manufacturers that received similar benefits based on statements it made in the California litigation. Petitioners still contend that Fibreboard believed in the truth of the evidence in question, and that, having been offered in a court of law to induce a judge to act, the statements carry the highest credibility.

Respondents' plea that Fibreboard was protecting plaintiffs' interests (Brief 21) rings hollow when the record reflects the opposite. The contention provides no justification for disregarding Fed. R. Evid. 801.

FIFTH: Respondents' fifth argument is overly simplistic if not misleading. If adopted, it would create much mischief for litigants for a long time. Respondents imply that federal practice permits litigants to change facts

depending upon whether a benefit is to be derived or a detriment incurred. Such is prohibited by Fed. R. Civ. P. 11. Harm has been done to Petitioners. Unless this Court grants relief, the harm will be magnified and multiplied many fold.

Respondents' fifth argument is flawed because the evidence in question did not come from a "pleading" as defined by Fed. R. Civ. P. 8. Under Rule 8, a "pleading" initiates or answers a lawsuit. The Rule dictates " . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . " The evidence in question came from instruments summarizing Fibreboard's position on the pathogenesis of asbestos-related diseases. The instruments in question were not "pleadings" as defined by Rule 8. Therefore, Respondents' argument about contingent, hypothetical, or inconsistent assertions in "pleadings" is not relevant.

Petitioners have no quarrel with Fed. R. Civ. P. 8(e)(2) permitting alternative or hypothetical pleadings because subsection 2 is made subject to Fed. R. Civ. P. 11 requiring that the allegations be "well grounded in fact . . . " The instruments in question set forth facts that Fibreboard believed entitled it to judgment.

Petitioners are not blind to Fibreboard's litigation position in California. In that litigation Fibreboard sought to stack insurance policies going back decades. It wanted insurance coverage to cover the period from a claimant's **first** exposure, throughout the latency period, and beyond. Fibreboard argued to the California court:

> . . . When *Borel*[3] was decided, however, the insurers recognized that asbestos bodily injury cases were precisely the type of latent disease cases that triggered coverage throughout the period of exposure and beyond.

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[3] *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974)

> The *Borel* decision contains an explicit description of the pathogenesis of asbestosis and other asbestos-related diseases that **is not only acccurate**, but that the insurance industry for years accepted as accurate, until it fully realized the financial ramifications of their coverage commitments after asbestos-related claims began to multiply . . . [4] (Emphasis added)

To stack the insurance policies, or implicate multiple policies, Fibreboard had to prove the pathogenesis of asbestos-related diseases. The pathogenesis of asbestos-related diseases triggered multiple insurance policies. It also aided the court and jury in Texas in understanding the medical results of exposure to asbestos.

Respondents' argument about asserting a position to establish the existence of bona fide liabilities is not relevant. Fibreboard stipulated defectiveness of the products, and the cases were tried on damage issues, product exposure, producing cause, and quantum. Petitioners' evidence was not offered for the purpose Fibreboard implies.

C. Respondents' "Independent Grounds" Do Not Withstand Analysis

The flaw in Respondents' argument is the fact that the juries in *Hardy* and *Dartez* were not called upon to "grasp the difference between the proof necessary to establish general insurance coverage for asbestos exposure injuries and that necessary to show whether these plaintiffs' individual conditions had or might progress ineluctably." Pet. App. 13a (Resp. Brief 22). This simple fact also discloses the flaw and the harm in the Fifth Circuit's opinions in both *Dartez* (Pet. App. 13a) and *Hardy* (Pet. App. 22a).

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[4] Post-Trial Phase III Brief of Policyholders on Trigger of Coverage (Petitioners' Record Excerpts, Tab 1, p. 61)

Both the Fifth Circuit and Respondents imply that the jury knew that Fibreboard had filed briefs in an insurance coverage case. Such was not the case. The exhibits that the jury saw were Petitioners' exhibits 46 and 47.[5] The exhibits were identified only as "Statements Filed In the Superior Court of California" on certain dates by named manufacturers, including Fibreboard. The complete briefs, in both *Hardy* and *Dartez*, were before the trial court only. How the Fifth Circuit could conclude that the jury was confused by evidence it did not have is a mystery. But it certainly raises due process questions when an appellate court denies Petitioners their judgment based upon such a conclusion.

There is further error. The Fifth Circuit's decision changed the burden of proof in favor of Fibreboard. Respondent was relieved of its burden to explain the unexplainable. The pathogenesis of asbestos-related diseases in human beings is the same in Texas as it is in California. Fed. R. Evid. 403 is not applicable to these cases. A jury cannot be incurably prejudiced by evidence that it did not have to review.

Respondents' argument about the interaction of Fed. R. Evid. 403 and 411 is simply a red herring. There was no evidence of insurance before the jury, and the liability issues (i.e., defectiveness of the products) had been taken out of the case by stipulation. Respondents charge Petitioners misstated the opinion below. (Respondents' brief, page 22, footnote 20). The precise language in the opinion was " . . . **These 'admissions' appeared both to support plaintiffs' contention** that their conditions were going to worsen **and to contradict the manufacturers' defense** that these plaintiffs were unlikely to contract the diseases in issue." (Pet. App. 13a, emphasis added). Petitioners continue to believe this means relevant and probative.

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[5] Respondents' record excerpts in the Fifth Circuit, Tabs 4A and 4B.

D. The Implications Of This Case Warrant This Court's Review

First: Respondents' argument that the law of the case doctrine should be invoked to punish Petitioners for judicial waste glosses over the due process infirmities of the *Hardy* decision. Further, Petitioners did not believe the case was ripe for consideration by the Supreme Court.

In *Hardy*, the Fifth Circuit made a point of stressing the difference between factual allegations in trial court pleadings (Pet. App. 21a) and statements in appellate briefs (Pet. App. 22a) pointing out that "Appellate briefs may not properly purport to be statements of what the real world facts are, but must rather be statements of what the trial court record reflects. *The distinction here is crucial.*" (Pet. App. 22a – emphasis in the original). With this distinction in mind, Petitioners examined defendants' statements at the trial court level to see what the defendants were saying there. It turned out that the pathogenesis of asbestos-related diseases was described the same at the trial court level as it was in the *Hardy* appellate briefs, only in more detail. But, until the trial-court-level exception was explored, Petitioners did not feel that the case was ripe for this Court to consider. With this loose end dangling, Petitioners felt there was a substantial risk that this Court would deny certiorari, forever sealing the matter.

The *Hardy* decision was void because it deprived Petitioners of due process. Petitioners did not receive the benefit of the basic requirements of justice outlined in Fed. R. Evid. 102 – fairness in administration of the law, elimination of unjustifiable expense, truth was not ascertained, and the proceeding was not justly determined. The factors that account for this denial of due process can be summarized as follows: (1.) the Fifth Circuit exceeded its authority by amending Fed. R. Evid. 801 to create exceptions not found in the Rule; (2.) the Fifth Circuit

justified its conclusion by relying upon pre-Rules common law rather than Rule 801; (3.) the Fifth Circuit modified the burden of proof and persuasion to Petitioners' detriment; (4.) Petitioners were deprived of relevant original evidence; and (5.) Petitioners were deprived of relevant impeachment evidence.

In short, Petitioners were deprived of their judgment because the law and the facts were changed on them. Serious due process considerations have been violated that affect not only Petitioners but thousands similarly situated.

Respondents' second argument is short-sighted. Congress cannot solve this case or the others in the judicial system. Congress declared its policy when the rules of evidence were enacted. It is now the task of the judicial system to enforce that law. The number of cases pending is a problem, but the problem is aggravated when litigants in Petitioners' position must litigate factual situations having no basis in fact. Issues such as "state of the art" and the pathogenesis of asbestos-related diseases are but examples.

E. The Court Of Appeals Exceeded Its Power And In The Process Denied Petitioners Due Process

Petitioners agree with Respondents that the evidence in question "either are or are not admissible" (Brief 27) with one clarification. They are admissible or not under the Federal Rules of Evidence as written. The Fifth Circuit had no authority to create exceptions to justify exclusion of the evidence. That is the crux of Petitioners' case – their case was not judged according to law. The Fifth Circuit exceeded its authority. The decision is clearly wrong and Petitioners have been harmed.

The law of the case doctrine has no place in this case. In a contest between Petitioners' rights to due process – to have their case judged according to the law – and the

expediency of judicial finality, due process should prevail.

CONCLUSION

Respondents have failed to offer valid reasons for this Court to decline Petitioners' request for relief. The court of appeals departed from the accepted and usual course of judicial proceedings to an extent to call for the exercise of the Supreme Court's power of supervision. Certiorari should be granted.

Respectfully submitted,

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APPENDIX

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FIBREBOARD ANNOUNCES FAVORABLE INSURANCE SETTLEMENT. QUANTIFIES ASBESTOS LIABILITY AND REPORTS 1991 YEAR-END RESULTS

(CONCORD, CALIFORNIA, March 30, 1992) – Fibreboard Corporation (AMEX:FBD) announced today a favorable insurance settlement with Pacific Indemnity, its 1991 full year and fourth quarter results and quantification of its asbestos liability through the end of the decade.

PACIFIC INDEMNITY SETTLEMENT

Fibreboard announced today a settlement with Pacific Indemnity Insurance Company which could provide up to $360 million for asbestos-related costs. Fibreboard received an immediate $10 million payment plus a provision for an additional $20 million to meet asbestos expenses until the final resolution of insurance coverage litigation against Pacific and Continental Casualty Insurance Company. The agreement provides additional funds of up to $330 million dependent upon certain final court decisions.

Fibreboard Chairman, John Roach, said, "This favorable development for Fibreboard accomplishes two

objectives. First, it solves the short-term asbestos-related liquidity problem we previously disclosed. Second, assuming Fibreboard ultimately wins the insurance coverage appeal, which we believe is likely, Fibreboard will have virtually unlimited insurance coverage from Continental Casualty for pre-1959 personal injury asbestos claims and substantial amounts from this Pacific settlement to fund post-1959 claims." Roach added that a reversal of certain trial court judgments would relieve Pacific from any settlement responsibilities and Fibreboard would be responsible for repaying advanced interim funds. Further details of the Pacific Settlement follow.

* * *

all before general corporate and net interest expenses.

Roach went on to say, "All of Fibreboard's core businesses are cyclical, but are driven by different elements of the economy. Consequently, we cannot assume that all of our businesses would achieve their potential simultaneously. We therefore believe that the company, on a consolidated basis, has the potential within three years to achieve $15 to $20 million in pre-tax income."

The company cautioned that the earnings potential of its core business is based on conditions and assumptions affecting each of the businesses as described in its 1991 Form 10-K. Therefore, there can be no assurance that the potentials can or will be achieved.

ASBESTOS PERSONAL INJURY COSTS THROUGH 1999

Fibreboard has attempted to quantify its asbestos-related liabilities for existing claims and those reasonably anticipated through the end of the decade as well as its insurance resources available to satisfy those liabilities. While there are many uncertainties in such a process and significant risk of error exists, Fibreboard currently estimates such liabilities at $1.610 billion. Fibreboard believes it will ultimately receive insurance resources of $1.584 billion, resulting in a $26 million net liability. Since Fibreboard had $6 million of remaining asbestos reserves for unreimbursable costs, 1991 operating income was charged an additional $20 million to increase the reserve to a level the Company currently believes will be sufficient to cover unreimbursable asbestos related expenses to the end of the decade.

The quantification does not include personal injury claims likely to be received by Fibreboard after the end of the decade. Nor does it include asbestos-in-buildings claims which Fibreboard does not believe can be quantified at this time.

ACCOUNTING TREATMENT

Fibreboard has recorded as a liability the settlement amounts for claims resolved under its Insurance Assignment Program, even though the settling claimants agree to look to Continental Casualty for payment of the settlement. The amount of settlements under this program was $246.8 million at December 31, 1991. Fibreboard has recorded a corresponding increase in assets as it expects Continental will ultimately be required to satisfy these

settlements. In addition, Fibreboard has recorded as a liability amounts still to be paid under its Structured Settlement Program. Consequently, Fibreboard's total assets and liabilities increased significantly from year to year. Fibreboard expects total assets and liabilities will continue to increase in the future as further settlements are made under these programs and are

* * *